Pet. App. 20a (quoting *Tasini*, 533 U.S. at 499; brackets added by Second Circuit). Whether additional copyrightable material has been added is immaterial, as long as the "revision" presents the underlying work in its original context. Pet. App. 20a-21a. Contrary to the Eleventh Circuit's conclusion, in other words, there is no necessary inconsistency between a "revision" and the creation of a new collective work: "a permissible revision may contain elements not found in the original." *Id.* at 21a. As long as the additional elements "do not substantially alter the original context," *id.*, they do not negate the existence of a "revision" under § 201(c).

Indeed, as the district court below noted, the Eleventh Circuit's contrary conclusion contradicts not only the statutory text, but also the very passage of the legislative history on which the Eleventh Circuit relied. *See* Pet. App. 62a. The legislative history, after all, says that the § 201(c) privilege does not apply to an "entirely different" collective work, but a "new" collective work is not invariably an "entirely different" collective work. Thus, the Eleventh Circuit erred by focusing only on whether a "new" (or "other") collective work was created, as opposed to whether such a new collective work is "entirely different" from the original. *See id.* As the district court explained,

> A revised edition of an encyclopedia ... would contain some articles that have been revised to take account of new learning and some entirely new articles, as well as some articles in precisely their original forms. Each revised and new article would be copyrightable independently. Hence, *Greenberg*'s holding—that the presence of independently copyrightable material is inconsistent with a conclusion that the CNG is a "revision" of the print versions of the Magazine—cannot be reconciled with the legislative history. Indeed, it "defies the very

> legislative history" upon which the Eleventh Circuit relied.

Id. (quoting Jennifer L. Livingston, Casenote, *Digital "Revision": Greenberg v. National Geographic Society*, 70 U. Cin. L. Rev. 1419, 1429-32 (2002)).

The Eleventh Circuit's approach also violates the Copyright Act's "fundamental principle" of medium neutrality. Pet. App. 67a; *see also id.* at 25a. The Eleventh Circuit emphasized that the CNG reproduced the original magazines "in a new medium." *Greenberg*, 244 F.3d at 1273. But that consideration, as both the Second Circuit and the district court below noted, is legally irrelevant, because "[t]he transfer of a work from one medium to another generally does not alter its character for copyright purposes." Pet. App. 25a. As long as the context of the original collective work is preserved, the medium in which it is reproduced—whether microfilm, microfiche, CD-ROM, or any other existing or new medium—does not matter.

Similarly, the Eleventh Circuit erred by attaching any weight to the proposition that the CNG was "created ... for a new market." *Greenberg*, 244 F.3d at 1273. Petitioners also make much of this point. *See, e.g.*, Psihoyos Pet. (No. 05-490), at 3-6, 9, 15, 19; Ward Pet. (No. 05-504), at 6-7; Faulkner Pet. (No. 05-506), at 7. Nothing in the text or legislative history of § 201(c), however, suggests that the existence of a "revision" of an original collective work turns on the "market" for such a product. The statute does not allocate rights in different "markets"; rather, it gives authors a copyright in their individual work and publishers a copyright in the collective work as a whole. Whether a revised collective work is sold in a different "market" than the original has no bearing whatsoever on whether the revision alters the original context. Thus, bound volumes of *National Geographic* magazine or rolls of microfilm or sheets of microfiche may serve a different "market" (*e.g.*, libraries) than individual issues of the magazine, but no one would

suggest that respondents are not entitled to publish past issues in these other media.

This Court should not allow this clear circuit conflict to fester. From the outset, respondents challenged the Eleventh Circuit's *Greenberg* ruling as inconsistent with *Tasini*, and sought this Court's review more than four years ago to correct that ruling. This Court, however, denied the petition outright, without even directing the Eleventh Circuit to reconsider its ruling in light of *Tasini*. *See National Geographic Soc'y v. Greenberg*, 534 U.S. 951 (2001) (denying certiorari in No. 01-186).

Now that the Second Circuit has rejected *Greenberg*, this Court's review is necessary and appropriate. In light of the circuit conflict, respondents and other owners of copyrights in collective works cannot know the scope of their rights, and hence are necessarily chilled from exercising them. Thus, respondents cannot realistically publish the CNG as long as the conflict persists. This situation, of course, undermines "Congress' paramount goal in revising the 1976 [Copyright] Act": to enhance "predictability and certainty of copyright ownership." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

And even more fundamentally, clarification of the law in this area is vital to the preservation and diffusion of collective works in an era of rapid technological change. Technology now puts more than a century of *National Geographic* magazines at an individual's ready and inexpensive disposal: the CNG often retailed for considerably less than $100, and granted users access to all back issues of *National Geographic* magazine (which, in paperbound form, take up an entire room) on just thirty discs. But *National Geographic* is hardly alone in this regard; rather, *all* collective works (including magazines, newspapers, and encyclopedias) published on paper in the twentieth century and earlier (and thus inevitably subject to deterioration and decay) can now be made readily and inexpensively available in electronic and/or digital format.

The Eleventh Circuit's *Greenberg* decision, however, effectively gives freelancers the power to stop publishers from creating electronic or digital archives of their own collective works. At issue here, in short, is the future of public access to digital information depositories. It is hard to imagine a more compelling reason for this Court to clarify the law, and reaffirm copyright's constitutional goal of "promot[ing] the Progress of Science and useful Arts." U.S. Const. art. II, § 8, cl. 8.

In addition, petitioners themselves identify another such reason: failure to resolve the circuit conflict "will result in extensive forum shopping." Psihoyos Pet. (No. 05-490), at 19; *see also* Ward Pet. (No. 05-504), at 13; Faulkner Pet. (No. 05-506), at 18. Petitioners are to be commended for their candor on this score, since petitioners here are the plaintiffs in these cases, and plaintiffs are ones who pick the forum in the first place. What petitioners are saying, in other words, is that the Eleventh Circuit now beckons as a magnet for future lawsuits against respondents and other publishers.

If this Court is inclined to grant the petitions, respondents respectfully suggest that the Court grant the question presented at the front of this brief. Each of the three petitions frames the question presented differently, and each of them does so in a lengthy and argumentative fashion. *Cf.* S. Ct. Rule 14.1 ("The questions should be short and should not be argumentative or repetitive."). It is entirely appropriate, under these circumstances, for this Court to reformulate the question presented, *see, e.g.*, Robert L. Stern *et al.*, *Supreme Court Practice* § 6.25, at 416-17 (8th ed. 2002), and respondents respectfully propose the formulation set forth at the front of this brief.

Regardless of how the question presented is formulated, respondents urge this Court to make clear that it is limited to the statutory issue on which the Second and Eleventh Circuits are in conflict, and does not encompass the additional arguments that petitioners raised below. Only the Faulkner petition (No. 05-506) now appears to press any

such additional arguments (collateral estoppel, contract, transferability, and contributory infringement), but they do not remotely warrant this Court's review. With respect to collateral estoppel, the Faulkner petitioners simply challenge the Second Circuit's application of "well established" law to the facts of this case, and identify no legal conflict. *See* Faulkner Pet. (No. 05-506) at i, 11, 18-23. Moreover, the application of offensive non-mutual collateral estoppel is discretionary, *see, e.g., Parklane Hosiery*, 439 U.S. at 331; *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999), and the lower courts' resolution of that discretionary issue in this case would be mooted by this Court's resolution of the underlying statutory issue. Similarly, the contract issue raised by the Faulkner petitioners, *see* Faulkner Pet. (No. 05-506) at i, 24-26, does not warrant this Court's review, because none of the relevant contracts here addresses republication rights, and the whole point of § 201(c) is to provide a default rule where, as here, the relevant contracts are silent. Finally, the transferability and contributory infringement issues mentioned in passing by the Faulkner petitioners, *see* Faulkner Pet. (No. 05-506) at 26-27, are not even properly presented here, because they are not encompassed by any of the questions presented in the Faulkner petition, and indeed the Second Circuit did not even reach the contributory infringement issue because there was no infringement in the first place, *see* Pet. App. 26a.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for writ of *certiorari* limited to the question presented on the first page of this brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LOUIS PSIHOYOS *et al.*,

Petitioners,

v.

NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,

Respondents.

FRED WARD,

Petitioner,

v.

NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,

Respondents.

DOUGLAS FAULKNER *et al.*,

Petitioners,

v.

NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN LIBRARY ASSOCIATION, THE AMERICAN ASSOCIATION OF LAW LIBRARIES, THE MEDICAL LIBRARY ASSOCIATION, AND THE SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

This brief *amici curiae* is submitted by the American Library Association, the American Association of Law Libraries, the Medical Library Association, and the Special Libraries Association ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court grant the requested writ of certiorari and affirm the judgment of the U.S. Court of Appeals for the Second Circuit.

* * * * *

The **American Library Association** ("ALA") is a nonprofit educational organization of approximately 65,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public's right to a free and open information society.

The **American Association of Law Libraries** ("AALL") is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The **Medical Library Association** ("MLA") is a nonprofit, educational organization comprised of 4,700 health sciences information professionals and institutions. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledge base of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

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1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The **Special Libraries Association** ("SLA") is a nonprofit organization for information professionals and their strategic partners, and serves more than 12,000 members in the information profession, including corporate, academic and government information specialists.

* * * * *

Amici are organizations devoted to representing the interests of institutions and professionals responsible for collecting and preserving historical, scholarly and other records, including periodicals and other collective works, and for making these materials available to researchers and the public at large. These institutions and individuals assist their patrons in researching, retrieving and using these materials in traditional paper media, in microform, in CD-ROM and other multi-media formats, and via online services and the Internet. A significant part of their mission is to make available reliable, accessible, comprehensive repositories of back issues of newspapers, magazines, journals and other periodicals. In furtherance of that mission, they acquire licensed databases and digitized collective works and many are even involved with digitizing public domain works and copyrighted works in conjunction with copyright owners. Moreover, many institutional and individual members of *Amici* use the very CD-ROM product at issue in this case. *Amici* accordingly submit this brief to assist the Court's understanding of the practical implications of the issues at stake in this case.

SUMMARY OF ARGUMENT

This case presents a direct, material and acknowledged conflict between two U.S. courts of appeal on an important question of federal copyright law. In the proceedings below,[2] the U.S. Court of Appeals for the Second Circuit held that Section 201(c) of the Copyright Act (17 U.S.C. § 201(c)) confers upon Respondents the privilege of reproducing and distributing

2. The opinion below is reproduced in the "Appendix" to the "Petition for Writ of Certiorari" filed with this Court in *Psihoyos v. National Geographic Enters., Inc.*, No. 05-490. Petition Appendix ("Pet. App.") 1a-31a.

the copyrighted works of freelance contributors as part of a CD-ROM product, *The Complete National Geographic* ("CNG"). In the CNG, those contributions are perceptibly reproduced and distributed as part of the original collective works, or revisions thereof, in which they first appeared. The Second Circuit decision is therefore consistent with the Copyright Act of 1976, as amended (17 U.S.C. §§ 101-1332) (the "Act"), and this Court's decision in *The New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001) ("*Tasini*").

In the proceedings below, Petitioners sought to rely upon *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001) ("*Greenberg*") to preclude Respondents from litigating whether Petitioners' copyrighted works were lawfully reproduced and distributed as part of the CNG pursuant to Section 201(c). The Second Circuit, however, rejected Petitioners' attempts to foreclose further judicial consideration of this legal issue (Pet. App. 18a-19a) that the district court below had aptly characterized as "one of substantial public importance to the development of copyright law *and to its impact on the dissemination of knowledge*." Pet. App. 56a (emphasis added). It likewise rejected the flawed ruling in *Greenberg* that deemed unlawful what is effectively the mere conversion of intact periodicals from one medium to another because that ruling "substantially departs" from this Court's approach in *Tasini*. Pet. App. 19a. *Greenberg* was wrongly decided because the appeals court failed to focus on the Respondents' acts of reproducing and distributing the individual contributions "as part of" the original collective works or permissible revisions thereof, and disregarded how the contributions are "presented to, and perceptible by, the user. . . ." *Tasini*, 533 U.S. at 499. Rather, the *Greenberg* court found the CNG impermissible under Section 201(c) because, in essence, it combined digital facsimiles of entire collective works (scanned pages or the "replica" portion of the CNG) with software that enables users to search and perceive them with the aid of a machine or device. *See Greenberg*, 244 F.3d at 1273 n.12. The Second Circuit, like the district court below, rejected this reasoning and recognized

that digital fixations reproduced and distributed in the CNG are materially the same as the type of analog microfilm collections that this Court observed (*Tasini*, 533 U.S. at 501-02) are permissible under Section 201(c). *See* Pet. App. 20a-21a; 64a-65a and n. 85.

As a practical matter, unless this Court affirms the Second Circuit's ruling, the flawed decision in *Greenberg* will stand as the "law of the land," and this will almost certainly have a negative impact on libraries and their patrons for many years to come. Carried to its logical conclusion, the *Greenberg* ruling raises the specter of Section 201(c) being frozen in time, exclusively applying to older, non-digital technology to the detriment of research, scholarship and learning. The *Greenberg* decision inhibits the dissemination of collective works via digital and electronic media that involve combining digital facsimiles of complete collective works with software that enables users to perceive them. This ruling on what is allowed by the Copyright Act thwarts broader public availability not only of popular works like those of National Geographic, but also less widely accessible periodicals. Digital and electronic media also have functionality that exceeds traditional analog media and digitization is now one additional reformatting strategy to both preserve and provide access to many library collections. Notwithstanding the Second Circuit's ruling below, the *Greenberg* decision will continue to stymie the adoption and evolution of such useful technologies – unless and until this Court overrules it – because of the potential for publishers and other entities to be sued in the Eleventh Circuit over actions they take elsewhere.

ARGUMENT

A fundamental goal of copyright law is to promote "broad public availability of literature, music, and the other arts" through a system of private reward to authors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). At base, this Court's decision in *Tasini* was about fair compensation to individual authors when commercial electronic database publishers, without additional permission, reused articles from

previously published collective works to create entirely different collective works and sell articles on an individual basis. Thus, it protected the author's private reward pursuant to the balance that Congress struck in enacting Section 201(c). The instant case, by contrast, is ultimately about the other side of that balance. It is about the ability of collective work owners to take advantage of new technologies to distribute their creative works more broadly, and ultimately the public's ability to access and use them.

Although the facts of this case and *Greenberg* are superficially similar to those in *Tasini* (i.e., they address whether publishers are entitled under Section 201(c) to reproduce freelance contributions in certain electronic contexts), there are, as recognized below, critical differences that make the CNG permissible under Section 201(c). *See* Pet. App. 5a-6a; 20a-21a; 69a. However, unless this Court affirms the Second Circuit's decision and rejects the reasoning of *Greenberg*, it is difficult to see how Section 201(c) could apply in a digital environment, even if the product in question otherwise met all the requirements of Section 201(c). Thus, *Greenberg* will likely continue to have an adverse impact on the public availability of copyrighted works and the development of new media collections.

I. *Greenberg* Is Contrary To Section 201(c) And *Tasini*, And It Found Infringement Based On Mere Conversion Of Works Into A Medium Requiring A Machine Or Device To Perceive Them

A. The CNG Is Distinguishable From The Products At Issue In *Tasini*

It is permissible under Section 201(c) for the owner of a collective work copyright to reproduce an exact facsimile of the complete collective work, whether in paper or other forms, such as microfilm and microfiche. *See Tasini*, 533 U.S. at 501-02. This would be true even if multiple, exact reproductions were combined into a single package in which several entire issues of a series of collective works would be distributed as a

unit (like traditional microfilm). *See id.* at 501. When one distributes the constituent works in this manner, one is both reproducing and distributing them "as part of" the original collective works, as provided for in Section 201(c), including all of the selection, coordination, and arrangement of the original collective works. These practices, which are not problematic under *Tasini* when applied to traditional media, become impermissible under the *Greenberg* analysis if the exact facsimile is in digital form with supporting software. As the Second Circuit recognized below, this conclusion is not required by or consistent with *Tasini*.[3]

In *Tasini*, this Court was faced with three different electronic database products and held that none of them complied with the requirements of Section 201(c). One product was the NEXIS online database in which millions of articles in electronic file format from thousands of periodicals had been reproduced and made available online to users, in effect on an individual basis. *See Tasini*, 533 U.S. at 499-500. The other two were CD-ROM products. One, known as "GPO," was image-based. It showed each article exactly as it appeared on the printed page, *but the CD-ROM contained articles from approximately 200 publications or sections of publications. Id.* at 491. The other CD-ROM product contained only the *New York Times*, *but it did not have the original formatting or accompanying images*

3. The *Greenberg* court assumed, but did not decide, that the "replica" portion of the CNG was permissible under Section 201(c). 244 F.3d at 1272. Petitioners, however, effectively claim that even the "replica" portion is impermissible because multiple issues of the magazine are included in one product. *See* Psihoyos Pet. (No. 05-490) at 17; Ward Pet. (No. 05-504) at 20-21. The Second Circuit implicitly rejected these contentions, as the reproduction and distribution to the public of multiple issues of a periodical via the same piece of plastic in digital form is highly analogous to the use of microforms. *See* Pet. App. 20a-21a. It does not diminish the fact that the contributions to those periodicals are thereby being reproduced and distributed "as part of" the original collective works. *Accord* Pet. App. 68a-69a (CNG is a package that contains substantially everything that made the magazine copyrightable as a collective work).

from the original publication. Id. at 500. Both of the CD-ROM products in *Tasini* displayed the articles *in such a way that they were not linked to other articles appearing in the original print publications* and the user who wished to see other pages of the original collective work could not simply "flip" to them. A new search was required. *Id.* at 491 n.2. These characteristics destroyed the claim that the reproductions and distributions of the articles therein were "as part of" qualifying collective works.

In deciding that these products were not permissible under Section 201(c), this Court's focus in *Tasini* was on the freelance articles "as presented to, and perceptible by, the user" of the commercial electronic databases before it. *Id.* at 499. The Court's inquiry was "whether the database itself perceptibly presents the author's contribution as part of" the collective work or revision thereof. *Id.* at 504. The products in *Tasini* presented freelance articles to users "clear of the context provided either by the original periodical editions or by any revision of those editions." *Id.* at 499. The products did not perceptibly reproduce and distribute the freelance articles "as part of" the original periodicals or permissible revisions. *Id.* at 500. Significantly, the products offered users individual articles, not intact periodicals, and did not involve "a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another" as happens with microfilm. *Id.* at 501-02.

Turning to the CNG, this product is fundamentally a mere conversion of intact print periodicals into the medium of CD-ROMs. The freelance contributions alleged to be infringed appear in the CD-ROM versions *in the exact positions* in which they appeared in the original print version of the magazines. Pet. App. 5a, 20a. Photographs and articles are presented in the context of the full, original issues (even with original advertising). Pet. App. 5a-6a; 64a. In addition, a user of the CD-ROM can "flip" to other articles and pages in the digital facsimile of an issue in the same order in which those articles and pages were originally presented in the printed editions. *See id.* at 5a; 64a-65a. Although there are 100 years (or more)